

**BEFORE THE
FEDERAL MARITIME COMMISSION**

COMBUSTION STORE LIMITED,)	
)	
Complainant,)	
)	
v.)	Docket No. 15-02
)	
UNIGROUP WORLDWIDE – UTS,)	
)	
Respondent.)	
_____)	

**RESPONDENT UNIGROUP WORLDWIDE, INC.’S
REPLY IN SUPPORT OF MOTION TO DISMISS THE
COMPLAINT OF COMBUSTION STORE LIMITED**

Pursuant to Rule 70 of the Commission’s Rules of Practice and Procedure,¹ Respondent UniGroup Worldwide, Inc.² (“UniGroup”) hereby replies to Complainant Combustion Store Limited’s (“Combustion”) Response in Opposition to UniGroup’s Motion to Dismiss. Combustion’s Complaint describes a complex, multi-carrier transaction in which two used aviation engines were shipped from the United States to the United Kingdom, but were received, according to the Complaint, without maintenance records (log books), the absence of which is said to have substantially reduced the value of the used engines. Combustion seeks reparations from UniGroup, one of many carriers and intermediaries involved in the transaction, for the alleged diminished value (\$397,517) of the two engines, plus interest and attorney’s fees. Compl. ¶ VII.

¹ 46 C.F.R. § 502.70.

² Incorrectly referred to as “UniGroup Worldwide – UTS” in the Complaint.

UniGroup's Motion to Dismiss rests both on the Complaint's failure to demonstrate or even allege clearly that the missing log books moved, or were even meant to move, in the ocean commerce of the United States, and UniGroup's position that the obligation to transfer aviation maintenance records is an issue between Combustion and the previous owner of the engines, an issue governed by federal regulations administered by the Federal Aviation Administration ("FAA").³

Shipping documents attached to the Complaint (Compl. Exs. 2, 3) make no mention of the maintenance log books, instead showing on their face that the shipment consisted of "2 used Rolls Royce Aircraft Engines." Compl. Ex. 2.⁴ Additionally, UniGroup's Motion to Dismiss provides yet another shipping document, directly referred to in the Complaint but for some reason not tendered as an exhibit by Combustion, which similarly describes the shipment as "2 Pallets Non Haz Used Rolls Royce Aircraft Engines." Motion to Dismiss ("MTD"), Ex. A. No document refers to the maintenance log books as having been shipped in ocean commerce. The Complaint itself concedes that "there is no indication that the log books were with the shipment" when "it was drayed from Atlanta to Charleston." Compl. ¶ IV.M.⁵

In its Opposition, Combustion seeks to deflect the force of UniGroup's Motion by compounding the vagueness of the original Complaint.⁶ Combustion continues to attribute acts

³ 14 C.F.R. § 91.419.

⁴ Exhibit 3 of the Complaint describes the cargo as two "non haz used rolls royce engines."

⁵ See also Compl. ¶¶ IV.I., J.

⁶ UniGroup's Motion noted that the Complaint itself refers to numerous actors in the underlying shipping transaction, several of whom, like UniGroup, are regulated transportation providers, but attempts to conflate indiscriminately all the actors under the UniGroup banner by

of others to UniGroup, regardless of which entity was directly involved. Opp. at 3 - 5. Combustion also misapprehends or misdescribes UniGroup's position concerning the "ocean" aspects of this transportation transaction. UniGroup does not dispute that "2 used Rolls Royce Aircraft Engines" moved by sea from a seaport in the United States to a seaport in the United Kingdom. For Combustion to pretend that this is an issue is a deliberate distraction. The central contention of the Motion to Dismiss is, rather, that the Complaint and its accompanying exhibits are inconsistent and contradictory – the proffered shipping documents (as well as Exhibit A of the Motion to Dismiss) consistently show that the only items moving in ocean commerce were the two used aviation engines. There was no third item, notwithstanding conclusory—and contradicted—allegations to the contrary. The Complaint itself recites that UniGroup was not aware of "a separate box" containing log books. Compl. ¶ IV.H. Finally, an affidavit submitted as an Exhibit to UniGroup's Motion to Dismiss is consistent with those aspects of Combustion's Complaint that indicate the log books did not move in ocean commerce. MTD, Ex. B.

I. The Complaint Fails to Describe a Shipping Act Violation and Does Not Establish Commission Jurisdiction Over the Shipment of the Missing Log Books.

In its Opposition, Combustion notes that, under the *Twombly/Iqbal* standard, a complaint need only contain sufficient factual allegations to state a plausible claim for relief. Opp. at 2. To be sure, this is a correct statement of the law, however, the *Twombly/Iqbal* inquiry is far more nuanced than Combustion allows. Importantly, both *Twombly* and *Iqbal* are cases where the Supreme Court found that complaints filed in civil suits **should be dismissed**. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 665 (2009). In essence,

referring to them as "agents", "representatives", "subcontractors" or "drivers" of UniGroup. See, e.g., Compl. ¶¶ IV.E., IV.F., IV.Q., and IV.Y.

Twombly and *Iqbal* raised the pleading standard to give reviewing tribunals – including this one – a means of screening out meritless or implausible complaints.

Those decisions provide the standard against which the Complaint should be measured. The *Iqbal* Court noted that, in evaluating a motion to dismiss for failure to state a claim, a reviewing court should “begin by taking note of the elements a plaintiff must plead to state a claim.” *Iqbal*, 556 U.S. at 675.

Combustion’s sole claim, and sole jurisdictional basis, for this action is an alleged violation of section 10(d)(1) of the Shipping Act, which provides:

PRACTICES IN HANDLING PROPERTY.--A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

46 U.S.C. § 41102(c).

Unigroup acknowledged in its Motion that recent Commission precedent has extended the scope of § 10(d)(1) claims to even single transactions. *See, e.g., Yakov Kobel v. Hapag-Lloyd*, 2013 WL 9808671 (F.M.C. July 12, 2013 (“Even if a common carrier, MTO, or OTI has established just and reasonable regulations and practices, it yet may have violated section 10(d)(1) by failing to observe and enforce those on one or a number of transactions.”); *see also DSW Int’l, Inc. v. Commonwealth Shipping, Inc.*, 2011 WL 7144019 (F.M.C. Mar. 29, 2011); *Yakov Kobel v. Hapag-Lloyd*, 2015 WL 3465821 (F.M.C. May 26, 2015).

The Complaint falls into this category, describing only a single transaction involving missing log books for which there is apparently no documentary indication of shipment, and, therefore, at best, stands at the outermost bounds of the Commission’s jurisdiction. But, even

viewed in its most favorable light, the Complaint fails to include sufficient, non-contradictory allegations to support a claim that this single transaction somehow violated the Shipping Act.

According to the Complaint, Unigroup was engaged to handle the shipment of airplane engines, “including the log books.” Compl. ¶ IV.D. In addition, the Complaint alleges that “UniGroup’s representatives” arrived to remove the engines, and a “17 x 17 x 12 inch box containing the log books.” Compl. ¶ IV.E. Finally, the Complaint alleges that “UniGroup knew from the outset that the log books were to be included in the shipment.” Compl. ¶ IV.Q. *These* are the only operative factual allegations in the Complaint to support Combustion’s claim that the log books were meant to be part of the disputed shipment.⁷

The problem with these allegations is that they are directly contradicted by *other, more specific* allegations in the Complaint, its exhibits or in the affidavit of the Southeastern Freightlines driver who picked up the shipment. Where a plaintiff’s “own pleadings are internally inconsistent, a court is neither obligated to reconcile nor accept the contradictory allegations in the pleadings as true in deciding a motion to dismiss.” *Nationwide Mut. Ins. Co. v. Morning Sun Bus. Co.*, No. 10–CV–1777, 2011 WL 381612, at *6 (E.D.N.Y. Feb. 2, 2011); *see also Doe v. Columbia Univ.*, No. 14–CV–3573, 2015 WL 1840402, *9 (S.D.N.Y. Apr. 21, 2015). In addition,

⁷ Under the *Twombly/Iqbal* standard, “[t]hreadbare recitals of the elements of a cause of action, supported by merely conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678. The Commission is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Id.* (quoting *Twombly*, 550 U.S. at 555). Many of the allegations that Combustion argues support its claim are merely legal conclusions that the Commission should remove from its analysis of whether the Complaint contains sufficient factual specificity to meet the *Twombly/Iqbal* standard. These include allegations that UniGroup “failed to exercise due diligence,” (Compl. ¶ IV.Q), and that there were “agency” or “subcontractor” arrangements between UniGroup and the multiple additional parties Combustion has chosen not to pursue, (Compl. ¶ IV.X).

exhibits supersede mere allegations and are afforded greater weight in the event of variance with bare allegations. *See, e.g.*, 5C Wright & Miller, Federal Practice and Procedure: Civil 3d § 1363 (“The district court will not accept as true pleading allegations that are contradicted by facts that can be judicially noticed or by other allegations or exhibits attached to or incorporated in the pleading”) (footnotes omitted).

First, UniGroup was *not* engaged to handle the shipment of the log books and clearly did *not* know from the outset that the log books were to be included in the shipment. UniGroup was engaged to handle the shipment of two aircraft engines, each a separate “piece.” Compl. ¶ IV.H. According to the Complaint, which incorporates, verbatim, an email from a UniGroup employee, “[a]fter [Unigroup was] given instructions by Connexion to set up booking for this shipment . . . [UniGroup] was also requested by Connexion to confirm with the shipper . . . that they would have the log book(s) with the shipment prior to pick up.” Compl. ¶ IV.G. (emphasis added). The request to make such an inquiry is not tantamount to engaging UniGroup to handle delivery of the log books, and even the failure to make such an inquiry would not, in UniGroup’s view, bring this action within the purview of the Shipping Act. But, in any event, Combustion’s Complaint recites that UniGroup *did* make that inquiry. According to the Complaint, UniGroup confirmed with the shipper that “the shipment was ready with the log books.” Compl. ¶ IV.H. UniGroup was told to pick up two pieces. *See id.* According to the Complaint, UniGroup *did* pick up and deliver two pieces. *See* Compl. ¶ IV.N.

Second, while the Complaint includes allegations that Excel, a representative of the prior owner, saw “Unigroup’s representatives” take possession of a third piece, a box containing the log books (Compl. ¶ IV.E.), other information before the Commission renders these allegations

implausible.⁸ As Combustion admits, no bill of lading evidences a third piece or refers to the log books at all. *See* Compl. ¶¶ IV.L., J., M. In addition, while Combustion attempts to argue that the bill of lading issued by Southeastern Freight Lines contains “handwritten alterations that appear to indicate that there might have been an item with the shipment in addition to the engines,” Compl. ¶ IV.L., that bill of lading actually stands, quite clearly, for the opposite proposition. The note states “2-[illegible] USED Engines.” Compl. Ex. 3. Another handwritten note on the bill of lading, though crossed out, states “Not Crated Used Engines.” *Id.* Despite Combustion’s assertions to the contrary, these notes seriously undermine any allegations that there was a third piece in the shipment. So does the Carotrans bill of lading, attached as Exhibit 1 to the Motion to Dismiss, which clearly shows **only two pieces**.

Both the exhibits to the Complaint and the Motion to Dismiss are properly reviewable by the Commission at this time. “In considering a Rule 12(b)(6) motion to dismiss, the court generally relies on the complaint, attached exhibits, and matters of public record.” *Sands v. McCormick*, 502 F.3d 263 (3d Cir. 2007). “The court may also consider ‘undisputedly authentic document[s] that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff’s claims are based on the [attached] document[s].’” *Gonzalez v. Napolitano*, 684 F. Supp. 2d 555, 558 (D.N.J. 2010) *aff’d on other grounds sub nom. Gonzalez v. Sec’y of Dep’t of Homeland Sec.*, 678

⁸ Combustion has, by separate motion, sought leave to file an amended complaint that attempts to cure any deficiencies in the verification of the original Complaint. By separate filing, UniGroup does not oppose that motion, and indeed, would have stated as much to Combustion had there been conferral on that point previously. However, even assuming that the verification of the Amended Complaint is proper (and it still fails to include the hallmarks of a notarization issued in the United States), it is at least worthy of note that the “verifier,” Sacha Vincent, is verifying the accuracy of conversations between Damon Garcia, Excel’s representative, and James Goswick, Southeastern Freightlines’ driver, who allegedly first took possession of the shipment. Sacha Vincent was not present during those events or conversations. James Goswick, however, later, provided an affidavit stating that he was the driver and that he *did not* take possession of a third item.

F.3d 254 (3d Cir. 2012) (quoting *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993)). No party has questioned the authenticity of the exhibits to the Complaint. In addition, Combustion makes no reference at all to the affidavit of James Goswick, the Southeastern Freight Lines driver, in its Opposition.

An even more flexible standard governs the evidence that the Commission may consider on a motion to dismiss for lack of subject matter jurisdiction, which UniGroup has also raised, based on substantially similar argument. “Unlike a Rule 12(b)(6) motion, consideration of a Rule 12(b)(1) jurisdiction-type motion need not be limited; conflicting written and oral evidence may be considered and a court may decide for itself the factual issues which determine jurisdiction. When resolving a factual challenge, the court may consult materials outside the pleadings” *Koronthaly v. L’Oreal USA, Inc.*, No. 07–5588, 2008 WL 2938045, at *2 (D.N.J. July 29, 2008) (quoted in *Gonzalez*, 684 F. Supp. 2d at 557).

Whether the Complaint is evaluated under the 12(b)(1) or the 12(b)(6) rubric, the result is the same. Combustion cannot, via a Shipping Act claim, attempt to impose liability for any failure to deliver the log books. Combustion has failed to “nudge [its] claims across the line from conceivable to plausible,” and its Complaint must therefore be dismissed. *Twombly*, 550 U.S. at 547.

II. The Strict FAA Regulatory Structure Governing Log Book Transfers Undermines Conclusory Allegations that the Log Books were Ever Intended to Travel by Ocean Transport with the Aircraft Engines.

Combustion fails to grasp the significance of the comprehensive regulation of log books by the Federal Aviation Administration (“FAA”), and the obligations such regulations impose. The FAA has exclusive authority to implement and enforce its regulations. Those regulations prescribe requirements for the form, content and custody of log books. In other words, aviation

maintenance log books are entirely a creation of federal regulations. The FAA *has* issued comprehensive regulations governing the transfer of log books, and has formally, via regulation, imposed duties upon an aircraft owner to transfer log books to an aircraft purchaser at the time of sale. *See* 14 C.F.R. § 91.419. As referenced in UniGroup’s Motion to Dismiss the Complaint, it is standard and prudent industry practice to make specific arrangements by contract for the delivery of log books. *See* MTD at 13, n. 18.

These comprehensive regulations governing log book transfer speak directly to why this Commission should dismiss this action. The Complaint offers only conclusory, non-specific allegations that the log books were to be part of the “shipment” at issue here. Specifically, while the Complaint states that UniGroup was engaged to handle shipment of the airplane engines, “including the log books,” emails from UniGroup employees quoted in the Complaint show that initially UniGroup was only tasked with shipment of the aircraft engines, and then, *later*, Combustion informally asked UniGroup personnel to inquire of the shipper whether the log books would accompany the engines. *See* Compl. ¶¶ IV.D., G. According to the Complaint, UniGroup *did* make that inquiry to the shipper, who confirmed the log books would accompany the shipment, but did *not* state that there was a separate package containing the log books. The bills of lading attached to the Complaint and offered with UniGroup’s Motion, *confirm* that there were only two components to the shipment – the two engines. The strict regulations governing log book transfer, regulations of which Combustion, Connexion, Excel and the previous owner of the engines (Mr. John Bone) were clearly well aware, undermine conclusory allegations that the ocean shipment, as contemplated by those persons, was ever meant to include log books. Put simply, the very notion that the log books were ever meant to travel via ocean commerce

pursuant to some informal communications after formal shipping instructions were made, without any reflection in any shipping documentation, is both implausible and of no legal effect.

FAA regulations clearly govern, in strict terms, the transfer of aviation log books, and impose strict obligations for the transfer of such records. See 14 C.F.R. § 91.419. Those in the aviation industry know of the importance of regulations governing aviation log books. Combustion attempts to impose the liability for ensuring compliance with FAA requirements on UniGroup, via a Shipping Act claim, when, aside from the conclusory, unsupported allegations in the Complaint, all indicators, including the bills of lading and contemporaneous email traffic at the time (all properly reviewable by the Commission at this stage), clearly show that the “shipment” in this case was for only two packages, each an aircraft engine. UniGroup met its obligations under the Shipping Act by performing its obligations to deliver those same two items. This Commission should dispose of this action now, at this early stage, rather than allow it to proceed through costly discovery and future motion practice.⁹

III. Conclusion


In summary, Combustion has presented the Commission with a peculiar complaint—a complaint that attempts to set new boundaries on how far the Commission will go to deem individual instances of alleged lost or damaged cargo as failures to “establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” 46 U.S.C. § 41102(c). In so doing, Combustion seeks to leapfrog the controlling limitations of its contractual undertakings with UniGroup, and with

⁹ See, e.g., *Twombly*, 550 U.S. 544, 546 (2007) (“It is no answer to say that a claim just shy of plausible entitlement can be weeded out early in the discovery process, given the common lament that the success of judicial supervision in checking discovery abuse has been modest.”).

the direct limits (both as to amounts and time frames for bringing actions) of federal statutes and treaty commitments governing disposition of cargo claims. But the Complaint is a gossamer, artificial construct because: (1) the shipping documents presented by Combustion do not support a claim that the missing log books moved by ocean, or were meant to move by ocean; (2) the narrative that the log books were given to a Surface Transportation Board regulated trucker who drayed the used jet engines is flatly contradicted by the driver's sworn statement; and (3) the obligation to transfer log books rests squarely on the prior owner of the engines, a person not subject to the Shipping Act and a person whose duties are governed by statutes administered by a federal agency other than this Commission.


For the reasons set forth above, the Presiding Administrative Law Judge should grant UniGroup's Motion to Dismiss.

Respectfully submitted, this 24th day of July 2015, by:



C. Jonathan Benner
Warren L. Dean, Jr.
M. Loughran Potter
Deona R. DeClue
Thompson Coburn LLP
Suite 600
1909 K Street, N.W.
Washington, D.C. 20006-1167
202-585-6900
FAX 202-585-6969
jbenner@thompsoncoburn.com
wdean@thompsoncoburn.com
lpotter@thompsoncoburn.com
ddeclue@thompsoncoburn.com

*Attorneys for Respondent,
UniGroup Worldwide, Inc.*

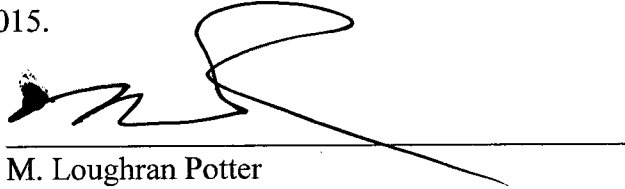


Scott W. McMickle
Chandler L. Smith
McMickle, Kurey & Branch, LLP
200 South Main Street
Alpharetta, GA 30009
Phone: (678) 824-7800
Toll Free: (877) 744-4954
Fax: (678) 824-7801
smcmickle@mkblawfirm.com
csmith@mkblawfirm.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon counsel for Complainant (Sean C. Griffin and Richard D. Gluck) via electronic mail and by mailing a copy via the US Postal Service.

Dated at 3:00 pm this 24th day of July, 2015.

A handwritten signature in black ink, appearing to be 'M. Loughran Potter', is written over a horizontal line. The signature is stylized with a large loop at the end.

M. Loughran Potter
For Respondent,
UniGroup Worldwide, Inc.